No. 1745.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

EXPLORATION MERCANTILE COMPANY (a corporation),

Plaintiffs in Error.

vs.

PACIFIC HARDWARE AND STEEL COMPANY (a Corporation), et al.

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS

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I.

Citation was issued by the District Court, and duly served on the Attorneys of record and service accepted, (Trans p.).

The application was in open Court, (Trans. p.).

And the lower Court had the righ to issue the citation.

In re Abraham 93 Fed. 767.

Rule 11 of this Circuit.

Alaska U. G. M. Co. vs. Keating 116 Fed. 561.

Cotter vs. Alabama 61 Feed. 747.

And the rule is that when the application is made in open Court, that such is due notice.

In re Feitchel 107 Fed. 618.

Berlinger Gramaphone vs. Seaman 108 Fed 714-715.

In re T. E. Hill Co. 148 Fed. 832.

And appearance waives notice and notice is dispensed with by general appearance.

Hardy vs. Donnellan 33 Ind. 501.

Prince vs. Wallis 37 Miss. 173.

People vs. Banker 5 N. Y. 106.

Johnson vs. Tyson 45 Cal. 257.

Hale vs. People 87 Ill. 72.

Shate vs. Keyser 149 U. S. 649.

Estill vs New York 41 Fed. 849.

Consolidated, etc., vs Combs 39 Fed. 25.

And the appearance of the parties, cures all defects of notice or want of notice.

Knox, et al. vs Summer 3 Cranch (U. S.) 496.

Pierce vs. Cox 9 Wall. (U. S.) 786.

And the citation may be served upon counsel.

Walters vs. Saunders 12 Wall. (U. S.) 142.

U. S. vs. Currey 6 How. (U. S.) 106.

And the citation is not jurisdictional.

In re T. E. Hill Co. 147 Fed. 832

If a party makes a motion in the cause not limiting his appearance to a spacific purpose, he will be held to have appeared generally for all purposes, and in this motion there is no limitation whatever, and a motion to dismiss is a general appearance.

Welch vs. Ayers 61 N. W. Rep. 635.

And a stipulation in a cause is a general appearance.

Keeler vs. Keeler 24 Wis. 525.

And this Defendant in Error, through J. L. Kennedy, Esq., their attorney of record, has stipulated at their request for additional papers in the cause, which stipulation is on file herein, and as the only object of notice is to give the parties the proper

opportunity to be heard in this cause— they cannot now object, after appearing and waiving notice.

II.

As to the second proposition, the officers and attorneys of the corporation are not in contempt of Court, and have duly presented their petition to review or revise the action and proceedings in that behalf to this Court, and the whole matter is in abeyance, and as will be seen by our brief in No. 1744, on the Petition to Revise, that there is no contempt and no jurisdiction in the District Court to make any order for conteempt or to show cause, and further none of the appellants in error have been cited to show cause in contempt proceedings as officers of the Exploration Mercantile Company, but as Receiver of the Stae Court, and attorneys and agents of said Receiver, and as plaintiff in suit pending in the State Court, and atorneys for said plaintiff, and besides of a contempt, such contempt has for all the purposes of this writ been condoned and placed in abeyance by the District Court, in the fact that the Hon. Judge of that Court, has personally allowed and qualified this writ and the petition to revise. Furthermore, the Writ of Error, is a writ of right, and the right of appeal by writ of error, cannot be cut off by the arbitrary power of a Court, especially when the parties are acting in good faith, and also, when the corporation only applies for the writ, and contempt proceedings against an officer of the corporation, will not be a contempt proceeding against the corporation. There is nothing in this ground.

III.

This Court has full jurisdiction in the premises

because by law, the District Court has jurisdiction of all causes in bankruptcy. The filing of a petition in bankruptcy, whether good or bad, and proper service of process on the defendant, gives the Court jurisdiction. The absence of this class of jurisdiction—that is the inability to act at all—is the jurisdiction meant by Sec. 5 of the Act of Congress, creating Circuit Court of Appeal, wherein the words are used, "In any case in which the jurisdiction of the Court is in issue."

But the question whether a complaint states facts sufficient to constitute a cause of action—is not the absence of jurisdiction—but the exercise of jurisdiction.

"Jurisdiction is the authority to hear and determine a cause."

Daniels vs. Tierney 102 U. S. 418
Allegate vs. Lexington & Co. 117 U. S. 267
Simmons vs. Saul 138 U. S. 454
Holmes vs. Oregon etc., 5 Fed. 534.
Holmes vs Oregon, etc., 9 Fed. 232.

The authority to decide a cause at all and not the decision rendered therein, is what makes up jurisdiction.

Decatur vs. Paulding 14 Pet (U. S.) 600.
Chase vs. Christiansen 41 Cal. 253.

The decision of all other questions arisng in the cause is but an exercise of that jurisdiction.

Gray vs Bowles 74 Mo. 423.

"The test of jurisdiction is, whether the tribunal has the power to enter upon the inquiry, and not whether its conclusion in the course of it, were right or wrong."

Van Fleet Coll. Attack p. 82 Ed. 1892.

This distinction is very clearly made by Justice Brewer, now of the Supreme Court of the United States in

Cooke vs Bangs 31 Fed. 640, at pages 643, 644 and 645.

This Writ is not based on the ground that the Court has no jurisdiction at all—but that the Court erred in the exercise of jurisdiction, for the reason that the creditors petition did not state facts sufficient to constitute a cause of action and therefore the Court should have sustained our motion in arrest of judgment, and this is certainly the ruling in

W. U. Tel. Co. vs. Sklar 126 Fed. 295.

Kentucky Life Ins. Co. vs. Hamilton 63 Fed. 90.

Where on Writs of Error the Court of Appeals for the Sixth Circuit, had no difficulty in dealing with this question; so the following cases found no difficulty, in construing the right to jurisdiction.

Odell vs Boyden 150 Fed. 731.

Coles vs. Granger 74 Fed. 16.

Reliable, etc., vs. Stahl 105 Fed. 663.

Rust vs. United W. Co. 70 Fed. 129.

King vs. McLean, etec., 64 Fed. 325.

Lake Nat. B. vs W. S. B. 78 Fed 517.

Beck vs Walker 76 Fed. 10.

U. S. vs Jahn 155 U. S. 109.

Tampa S. R. R. Co. 168 U. S. 583.

And in any event, this would not be a ground for dismissal, as this Court, under the rule laid down in U. S. vs. Jahn supra would then certify the cause to the Supreme Court of the United States.

IV

The Writ in this cause has been amended as to the test clause, and in all other maters is perfect and under

Rule 11, of this Court.

Alaska U. G. M. Co. vs. Keating 116 Fed. 561.

Catler vs. Alabama 61 Fed. 747.
Was properly issued by the District Court.

V.

The assigments of error, certainly and clearly raise issues of law, which can be pased upon by this Court.

Western U. Tel. Co. vs. Sklar 126 Fed. 295.
Kentucky L. Ins. Co. vs Hamilton 63 Fed. 93.
Slocum vs. Pomeray 6 Cranch 221.
Bond vs Dunstan 112 U. S. 609.
Lehnon vs. Dickson 148 U. S. 71.

And the remedy pursued here is proper.

Duncan vs. Landis 106 Fed. 839.
Elliott vs. Toppner 187 U. S. 327.

The motion should be denied.

Thompson, Morehouse & Thompson
Attorneys for Plaintiff in Error.